SUPREME COURT, U.S.
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No. 87-.....

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

TRANSWESTERN PIPELINE COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October 5, 1987

QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission ("FERC") acted arbitrarily in eliminating Transwestern Pipeline Company's ("Transwestern") fixed-cost minimum bills on the ground that they "restrain trade."

2. Whether the FERC erred in holding the *Mobile-Sierra* doctrine inapplicable to Transwestern's contracts with its customers and in abrogating such contracts as they related to minimum bills.

3. Whether the FERC's decision to eliminate minimum bills and substitute the modified-fixed-variable method of cost recovery was supported by substantial evidence.

4. Whether the FERC engaged in reasoned decision-making when it changed without explanation its longstanding practice of approving minimum bills as cost-recovery mechanisms.

5. Whether the FERC engaged in reasoned decision-making in failing to address the take-or-pay consequences of its action.

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PARTIES TO THE PROCEEDING BELOW

Arizona Electric Power Cooperative, Inc.
Arizona Public Service Company
City of Wilcox, Arizona
El Paso Natural Gas Company
Federal Energy Regulatory Commission
Foothills Pipe Lines (Yukon), Ltd.
Gas Company of New Mexico, a Division of Public Service Company of New Mexico
Kansas Power and Light Company
Northwest Central Pipeline Corporation
Pacific Gas and Electric Company
Pacific Gas Transmission Company
Pacific Interstate Offshore Company
Pacific Interstate Transmission Company
Pacific Lighting Gas Supply Company
Pacific Offshore Pipeline Company
Pan-Alberta Gas Ltd.
Public Utilities Commission of the State of California
Southern California Gas Company
Southern Union Gas Company
Southwest Gas Corporation
State Corporation Commission of the State of Kansas

LIST OF SUBSIDIARIES AND AFFILIATES PURSUANT TO RULE 28.1

Belco Petroleum Corporation (Delaware)
- Belco Petroleum Corporation of Peru (Delaware)
- Belco Petroleum International, Ltd. (Delaware)
- Belco Petroleum Israel, Ltd. (Delaware)
- Belco Petroleum Latin America, S.A. (Delaware)
- Belcoal, Inc. (Delaware)
- Sonneborn Associates Petroleum Corporation (Delaware)

Enron Americas, Inc. (Delaware) — Dissolution Pending
- Enron Peru, Inc. (Delaware) — Dissolution Pending

Enron Arctic Gas Company (Delaware)
Enron (The) Art Foundation (Nebraska)
Enron Coal Company (Delaware)
Enron Coal Pipeline Company (Delaware)
Enron Cogeneration Company (Delaware)
- Enron Bayou Co-Gen, Inc. (Texas)
- Enron Cogeneration One Company (Delaware)
- Enron Cogeneration Two Company (Delaware)
- Enron Cogeneration Three Company (Delaware)
- Enron Cogeneration Four Company (Delaware)
- Enron Cogeneration Five Company (Delaware)
- Enron Cogeneration Resources Company (Delaware)
- Enron Cogeneration Six Company (Delaware)

Enron Engineering International Co. (Delaware)
Enron Foundation — Houston (Texas)
Enron Foundation — Omaha (Nebraska)
Enron Gas Gathering, Inc. (Delaware)
Enron Gas Marketing, Inc. (Delaware)
Enron Gas Processing Company (Delaware)
Enron Gas Services Company
Enron Gas Supply Company
Enron Gas Transportation Company (Delaware)

Enron Helium Company (Delaware)
Enron Holdings, Inc. (Delaware)
Enron International Incorporated (Delaware)
  Enron Canada Ltd. (Canada)
    CGS Energy Inc. (Delaware)
    Consolidated Natural Gas Ltd. (Canada)
    Norlands Petroleum Limited (Alberta)
  Enron Gas Canada Ltd.
    Consoligas Management Limited (Canada)
  Consolidated Pipe Lines Company (Own 44.6%)
    (Canada)
  Enron Oil Corp. (Delaware)
      Enron Oil Ltd. (Partnership) (London)
      Enron Oil Private Ltd. (Singapore)
  Enron Gas Liquids International, Ltd. (Delaware)
    Enron Chemical International Division
    Enron Gas Liquids International (U.K.), Ltd.
    Enron Gas Liquids France S.A.R.L. (France)
      (Formerly NLFI France S.A.R.L.)
    NLFI (Far East) Trading Private Limited (Singapore)
      (To Be Dissolved)
    NLFI Products and Crude, Inc. (To Be Dissolved)
  InterNorth International Oil Incorporated, Ltd. (U.K.)
  The Protane Corporation
    Citadel Corporation Limited (Cayman Island)
      Citadel Venezolana S.A. (Venezuela)
      Industrial Gas Limited (Jamaica)
      Manufacturero De Apartos Domesticos, S.A.
        (Medosa)
      Secoven Servicios Consolidados Ventane, S.A.
    Industrial Gases Limited
    Industrial Lacarda, S.A.
    Industrias Ventane, S.A.
    ProCaribe, Inc.
    ProCaribe Division of The Protane Corporation

Progasco, Inc. (Puerto Rico)
Servicios Vengas, S.A.
Transporte Mil Ruedas, S.A.
Vengas De Caracas
Vengas De Centro, S.A.
Vengas De Occidente, S.A.
Vengas De Oriente, S.A.
Enron Liquids Marketing Company (Delaware)
Enron Liquids Pipeline Company (Delaware)
Enron Minerals Company (Delaware)
Enron Oil & Gas Company (Delaware)
Belco Petroleum North America, Inc. (Delaware)
Belco Petroleum Australia, Inc. (Delaware)
Belco Petroleum Ecuador, Inc. (Delaware)
Enron Exploration Company (Texas)
Enron Producing Company (Delaware)
HNG Fossil Fuels Company (Texas)
HNG Oil (Sumatra) Inc. (Texas)
IN Holdings, Inc. (Delaware)
Enron Oil Canada, Ltd. (Alberta, Canada)
Ocelot Oil Company (Delaware)
Southeastern Exploration Company (Florida)
Enron Oil Trading & Transportation Company (Delaware)
Enron Oil Trading & Transportation Canada Ltd. (Canada)
Falcoal, Inc. (Delaware)
J. E. Fowler Petroleum Products, Inc. (Louisiana)
Port Cordova, Inc. (Alabama)
Webster Transportation Company, Inc. (Louisiana)
Enron Overthrust Pipeline Company (Delaware)
Enron Trailblazer Pipeline Company (Delaware)
Houston Natural Gas Corporation (Texas)
The Bermuda Company (Texas)
Black Marlin Pipeline Company (Texas)
Coal Properties Corporation (Illinois)

Comanche Marketing, Inc. (Texas)
Continental Group Resources Company (Florida)
Cora Dock Corporation (Texas)
Enron Capital Corp. (Delaware)
Enron Clearing House Company (Texas)
Enron Co-Gen Fuels Company (Texas)
Enron Gas Pipeline Operating Company
Enron Holdings Corp. (Texas)
Enron Industrial Natural Gas Company (Texas)
Enron Interstate Pipeline Company (Delaware)
Enron Mojave, Inc. (Texas)
Enron Offshore Company (Texas)
Enron Resources, Inc. (Texas)
Enron Texoma Gas Company (Texas)
Florida Intrastate Pipeline Company (Florida)
Gulf Company Ltd. (Bermuda)
HNG Capital Corp. (Delaware)
HNG Cortez Pipeline Company (Delaware)
HNG Holdings Corp. (Texas)
HNG Oil Company (Delaware)
  HNG Offshore Properties, Inc. (Delaware)
Houston Pipe Line Company (Texas)
Intratex Gas Company (Texas)
Marcoal Inc. (W. Virginia)
Natural Gas Marketing & Storage Company (Texas)
Northern Natural Gas Supply Co.
Pacific Atlantic Marketing, Inc. (Texas)
Panhandle Gas Company (Texas)
Pott Industries Inc. (Missouri)
  Caruthersville Shipyard Inc. (Delaware)
  The Dixie Dredge Export Corporation (Missouri)
  Paducah Marine Ways Incorporated (Delaware)
Sunniland Pipe Line Company, Inc. (Florida)
Transgulf Pipeline Company (Florida)
Transwestern Pipeline Company (Delaware)

Valley Pipe Lines, Inc. (Texas)
IDT Gas Supply Company
Katy-Waha Gas Marketing
KMC Associates, Incorporated
NGP Pipeline Company (Delaware)
Northern Intrastate Pipeline Company (Delaware)
Northern Natural Gas Supply Company (Delaware)
Northern Plains Natural Gas Company (Delaware)
AmNorth, Inc. (Nebraska)
Northern Border Pipeline Company (Delaware)
Northern Texas Intrastate Pipeline Company (Delaware)
Pathfinder Assurance Limited (Bermuda)
Seagull Shoreline System (A Texas Partnership composed of Northern Intrastate Pipeline Company, HNG Offshore Company and Seagull Transmission Company)

JOINT VENTURE COMPANIES:

Citrus Corp. (Delaware)
Citrus Interstate Pipeline Company (Delaware)
Citrus Trading Corp. (Delaware)
Florida Gas Transmission Company (Delaware)
Florida Intrastate Pipeline Company (Florida)
Cogenron Inc. (Delaware)
HT Gathering Company (Texas)
Mojave Pipeline Operating Company (California)
Oasis Pipe Line Company (Delaware)
San Marco Pipeline Company (Colorado)
The Standard Shale Products Company (Colorado)
Zapata Gulf Marine Corporation (Delaware)

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TRANSWESTERN PIPELINE COMPANY,

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v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Transwestern Pipeline Company ("Transwestern") respectfully petitions this Court for review of a decision of the United States Court of Appeals for the Fifth Circuit affirming Opinions Nos. 238 and 238-A ("Opinion 238") of the Federal Energy Regulatory Commission ("FERC" or "Commission").

OPINIONS BELOW

The opinion of the court of appeals is reported at 820 F.2d 733 and is reproduced in the Appendix to this Petition. The opinions of the FERC are reported at 32 FERC ¶ 61,009 (1985) and 36 FERC ¶ 61,175 (1986) and are likewise reproduced in the Appendix ("App.").

JURISDICTION

The judgment of the court of appeals was dated and entered on July 7, 1987. App. B-1. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2101(c), and 2350 (1982).

STATUTES INVOLVED

The principal statutory provisions involved are Section 4(d), 5(a), 7(e), and 19(b) of the Natural Gas Act of 1938, 15 U.S.C. §§ 717c(e), 717d(a), 717f(e), 717r(b), and Sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C. §§ 554, 556 (1982), all of which are set forth in the Appendix to this petition.

STATEMENT OF THE CASE

This case involves the FERC's elimination of Transwestern's fixed-cost commodity minimum bill arrangements with its customers, Southern California Gas Company ("SoCal") and Northwest Central Pipeline Company ("NWC").[1] It marks the discontinuation of a longstanding Commission policy of permitting minimum bill arrangements as cost-recovery mechanisms and the substitution therefor, purportedly to encourage competition, of a cost-recovery methodology known as the modified fixed-variable ("MFV") rate design. Under the MFV rate design, all of the regulated utility's return on equity, related taxes, and costs incurred in connection with facilities classified as "production and gathering facilities" are included in the commodity component of the pipeline's rate. App. D-36.

In Order No. 380,[2] the FERC eliminated the variable-cost portion of pipelines' minimum commodity bills, comprising

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[1] At the time of the hearing in this case, Transwestern's customer was Pacific Lighting Supply Company, an affiliate of SoCal. The two companies have since merged. NWC has subsequently been renamed Williams Pipeline Company. For convenience, these companies will be referred to herein as SoCal and NWC.

[2] *Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, 27 FERC ¶ 61,318, (1984), *aff'd sub nom. Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied sub nom. Transwestern Pipeline Co.* v. *FERC*, 106 S.Ct. 1968 (1986).

primarily gas cost.[3] Transwestern was one of the pipelines directly affected. As a result of Order No. 380, Transwestern's minimum bill arrangements with its customers, SoCal and NWC, were limited to fixed-cost recovery only.

At the time Opinion 238 was issued, SoCal and NWC accounted for more than 99 percent of Transwestern's total annual sales. Both SoCal and NWC have suppliers in addition to Transwestern. Among other suppliers, SoCal receives gas from three affiliated interstate pipelines, two of which deliver gas from the offshore federal domain, while the third delivers gas produced in Canada. NWC also receives supplies from other interstate pipelines but purchases the majority of its gas supplies directly from producers.

Transwestern was first certificated to sell gas to SoCal in 1959. Its original contract provided for a 100 percent minimum bill obligating SoCal to take or pay for on an annual basis the full amount of the certificated contract quantity. The Commission noted that this high level commitment was required in part because of the take-or-pay provisions in Transwestern's gas purchase contracts. *Transwestern Pipeline Co.*, 22 FPC 391, 395 (1959), *modified*, 22 FPC 542

[3] Two-part demand/commodity rates are in effect for virtually all pipelines subject to the FERC's jurisdiction. The demand rate is normally a monthly charge paid by the customer. The commodity rate is a charge for gas actually purchased. Under the rate design methodology in effect for Transwestern at the time Opinion No. 238 issued, one-half of its fixed costs were included in the demand rate; one-half of its fixed costs, all variable costs, and costs associated with production and gathering facilities were included in the commodity rate. The term "minimum commodity bill" or "full-cost minimum bill" refers to the contract or tariff arrangement between pipelines and their customers requiring the customers to make certain payments to pipelines which include variable costs, such payments being measured usually by a percentage of the contract demand level. The term "fixed-cost minimum bill" refers to a similar arrangement under which the customer pays a minimum agreed percentage of the commodity rate but only to the extent of the fixed costs contained therein.

(1959). By subsequent agreement, Transwestern's minimum bill level with SoCal was fixed at 91 percent of the annual contract quantity. *Transwestern Pipeline Co.*, 22 FPC 542, 543 (1959) Through successive agreements, Transwestern's contract demand levels to SoCal increased to 750 million cubic feet ("MMcf") of gas per day. *See Transwestern Pipeline Co.*, 41 FPC 134 (1969). Its minimum bill level was agreed to be 91 percent of that amount.

Transwestern was also authorized to sell a total of 250 MMcf of gas per day to NWC.[4] This authorization, like the authorization to sell to SoCal, was predicated upon private contracts negotiated with NWC's predecessor. Each of such contracts was reviewed and approved by the Commission in proceedings under Section 7 of the Natural Gas Act ("Act"). *Transwestern Pipeline Co.*, 34 FPC 659 (1965), *modified*, 35 FPC 182 (1966); *Transwestern Pipeline Co.*, 43 FPC 322 (1970).[5] Like the SoCal contracts, the contracts with NWC contained negotiated provisions for minimum bill levels set, however, at 90 percent of the annual contract quantity. Such contracts provided further that if Transwestern were not able to deliver the annual contract quantity, the minimum bill commitment of NWC would ratchet down to the lowest annual delivery level. As a result, Transwestern had a 59 percent minimum bill level with NWC at the time of the hearings in this case. App. A-5.

To sell its contract demand quantities of gas to SoCal and NWC, Transwestern was required to enter into a large num-

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[4] Under a recent settlement, Transwestern has agreed to reduce this contract level to 125 MMcf of gas per day.

[5] As a direct result of Order No. 380 and Opinion 238, NWC has discontinued all but minimal purchases from Transwestern. Its current purchases are in the 4 MMcf per day range. As a practical matter, therefore, Transwestern has only one major customer, SoCal. That customer's purchases have declined to a current level of only about 30 to 35 percent of the 750 MMcf per day certificated level.

ber of contracts with various producer/suppliers. It currently has in effect more than 1,000 contracts. Virtually all of its contracts require Transwestern, subject to *force majeure* and other defenses, to "take or pay for" specified volumes of gas on an annual basis, as well as to take minimum volumes of gas on a monthly basis.

The proceedings that led to Opinion 238 were filed by Transwestern as general rate increase proceedings. Issues were raised regarding the reasonableness of Transwestern's then-existing full-cost minimum bill arrangements. Other issues were settled. Extensive hearings on the minimum bill issues were held. The record was closed July 29, 1983. App. E-4. At the time the record was closed, the rulemaking proceeding in FERC Docket No. RM83-71-000, which ultimately led to Order No. 380, had not been instituted.[6] The record underlying Opinion 238 thus dealt exclusively with the competitive and other effects of Transwestern's then existing *full-cost* minimum bill, approximately 90 percent of which represented gas costs. App. E-37.

At the time Transwestern's minimum bill arrangements were before the Commission for consideration, the Commission had also instituted an investigation of the minimum bill arrangements between the two California utilities, SoCal and Pacific Gas & Electric Company, and such utilities' affiliated pipeline suppliers. At the instance of the Chief Administrative Law Judge, those investigative proceedings were consolidated with the Transwestern proceeding. The Chief Administrative Law Judge concluded that the issues involving the competitive effect of minimum bills on the California market were common to all pipeline suppliers and that the question of the justness and reasonableness of Trans-

[6] The notice of proposed rule-making in RM83-71-000 was issued August 25, 1983. Order No. 380 itself was not issued until May 25, 1984.

western's minimum bill should not be decided "in a vacuum." The Commission initially affirmed. It subsequently, however, suspended its investigation of the utilities' affiliated pipeline suppliers, severed the Transwestern proceedings, and directed the Presiding Administrative Law Judge to issue promptly a decision in the Transwestern case. *See Pacific Gas Transmission Co.*, 28 FERC ¶ 61,217 (1984), *vacated sub nom. El Paso Natural Gas Co.*, 33 FERC ¶ 61,267 (1985).

In his decision, issued December 11, 1984, the Presiding Administrative Law Judge concluded that the difference between Transwestern's 91 percent minimum bill to SoCal and its effective 59 percent minimum bill to NWC constituted undue discrimination and required Transwestern to file a 60 percent minimum bill for service to both customers. Recognizing that the hearing record had addressed only the competitive effects of *full-cost minimum bills* and that the character and effect of Transwestern's minimum bills had been significantly changed by Order No. 380, the Presiding Administrative Law Judge concluded that the proposed adjustments to Transwestern's minimum bill, including its total elimination and the imposition of a MFV form of rate design, were not supported by substantial evidence and should not, therefore, be considered or adopted. App. E-37, 42.

The Commission reversed. It adopted the recommendation of its staff that Transwestern's minimum bill be eliminated in its entirety and that the modified fixed-variable type of rate design be put in effect for Transwestern. It concluded that, based on "evidence in the record", *i.e.*, the fact that supplies in the California and midwest market areas exceeded demand, its "knowledge of the industry" and "common sense," Transwestern's fixed-cost minimum bills would have adverse consequences for Transwestern's com-

petitors and customers and unduly restrain trade. On this basis, it held the provisions were unjust and unreasonable. It concluded further that all of Transwestern's return on equity, related taxes, and all fixed costs associated with facilities classified as production and gathering facilities should be placed at risk and that a *zero* minimum bill with an MFV rate design would assure Transwestern of the recovery of all costs it "should recover." App. C-29.

At the same time, the Commission terminated its investigation of the minimum bill arrangements between the California utilities and their affiliate pipeline suppliers. *Pacific Gas Transmission Co.*, 32 FERC ¶ 61,001 (1985).

The Fifth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

This is the seminal case in which the Commission fully considers the justness and reasonableness under Section 5 of the Natural Gas Act of the fixed-cost-only minimum bill.

Minimum bills have been incorporated in service arrangements between pipelines and their customers virtually since the Commission began exercising its authority under the Act. These arrangements have been either the subject of contracts between pipelines and their customers or have been included through unilateral filings under Section 4 of the Act. In its generic Order No. 380, the FERC eliminated variable costs from pipelines' full-cost minimum bills. While the Commission said it would consider fixed-cost-only minimum bills on a case-by-case basis, its actions do not bear this out. In fact this case marks the Commission's initiation of a new policy of entirely eliminating minimum bills from pipeline contracts and tariffs, and substituting the MFV rate design method of cost recovery for interstate pipelines. This is demonstrated by the fact that the Commission has cited and applied without modification the rationale of this case

virtually in all other cases involving the minimum bill arrangements of major interstate pipelines.[7] The treatment of cost recovery provisions in interstate pipeline contracts and tariffs, and the total elimination of fixed-cost minimum bills clearly involve issues of substantial industry-wide significance. The precedential effect of this case is obvious. Opinion No. 238 has affected and will continue to affect the Commission's analysis of minimum bills and other cost-recovery mechanisms as well as the proof required in the determination of their justness and reasonableness.

Yet this case rests on seriously flawed analyses and interpretations of the Act and this Court's jurisprudence under the Act. In this case the FERC has misinterpreted this Court's decisions regarding the role of private contracts under the Natural Gas Act and the showing required to abrogate the provisions of such contracts under Section 5 of the Act, as enunciated in the *Mobile-Sierra*

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[7] *See, e.g., Tennessee Gas Pipeline Co., a Division of Tenneco, Inc.*, 36 FERC ¶ 61,071, at pp. 61,174-78 (1986) (eliminating existing fixed-cost minimum bill); *Transcontinental Gas Pipe Line Corp.*, 37 FERC ¶ 61,328, pp. 61,973-77 (1986) (eliminating existing fixed-cost minimum bill); *ANR Pipeline Co.*, 36 FERC ¶ 61,263, at pp. 61,748-57 (1986) (eliminating existing fixed-cost minimum bill); *Alabama-Tennessee Natural Gas Co.*, 38 FERC ¶ 61,251, at pp. 61,851-55 (1987) (eliminating existing fixed-cost minimum bill); *Panhandle Eastern Pipe Line Co.*, 38 FERC ¶ 61,164, at pp. 65,308-12 (1987) (eliminating minimum bill); *Great Lakes Transmission Co.*, 39 FERC ¶ 61,118, at pp. 61,464-66 (1987) (modifying contested settlement offer). *See also* the Presiding Administrative Law Judge's opinion in *Texas Eastern Transmission Corp.*, 38 FERC ¶ 63,034, at pp. 65,214-15 (1987) (eliminating existing fixed-cost minimum bill and interpreting *Transwestern* and cases following it as establishing the elimination of fixed-cost minimum bills as a matter of Commission law).

doctrine.[8] The FERC erroneously held that the *Mobile-Sierra* doctrine was inapplicable, and in so holding, substantially reduced the burden required to support its use of Section 5 abrogation powers. The court below compounded this error by affirming, without even considering the implications of the decision and its virtual emasculation of *Mobile-Sierra*. Because it thus conflicts with prior decisions of this Court, the decision warrants review.

The Commission's decision to eliminate Transwestern's minimum bill was also arbitrary and capricious and lacked the required reasoned analysis. It is based upon an arbitrary and inappropriate application of antitrust concepts developed under different statutes for different purposes. The decision thus constitutes seriously flawed precedent regarding an issue of industry-wide significance, the showing required to eliminate cost-recovery mechanisms from pipeline contracts and tariffs. Moreover, it provides a completely inadequate basis for altering the Commission's long-standing policy of permitting at least fixed-cost minimum bills, and it is in conflict with this Court's well-settled rule that such policy reversals must be supported by reasoned analyses. The importance of the issues involved and the conflict with previous decisions of the Court provide additional reasons for a review.

The decision also represents an erroneous interpretation by the Commission and the court below of the substantial evidence requirements of Section 19 of the Natural Gas Act. The record in this case was closed prior to the issuance of the notice of rule making that lead to Order No. 380. The record evidence regarding the competitive effect of Transwestern's minimum bill thus addressed only the effect of its full-cost

[8] This doctrine takes its name from this Court's two early decisions in this area: *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

minimum bill, not its fixed-cost-only minimum bill. The Commission's decision, therefore, was broadly conceptual. The "careful balancing" and other analyses of the competitive effect of Transwestern's fixed-cost minimum bill and the adequacy for cost-recovery purposes of the modified fixed-variable rate design without a minimum bill, which the Commission stated it undertook, were of necessity made without the benefit of *any* record evidence, much less the required substantial evidence.

Last, in eliminating Transwestern's minimum bill, the FERC failed to address the consequences of its decision on Transwestern's take-or-pay liability to its producers. The court below deferred to the Commission's decision. In permitting the Commission to eliminate Transwestern's minimum bill — as the Commission has subsequently eliminated the minimum bills of other pipelines — without dealing with the take-or-pay issue, the decision is in conceptual conflict with recent decisions of the Court of Appeals for the District of Columbia requiring the Commission to consider the take-or-pay consequences of major policy changes.

Review by this Court is thus warranted.

I.

This Court Should Review to Correct the FERC's Erroneous Interpretation of the *Mobile-Sierra* Doctrine and the Role of Contracts under the Act.

As noted, the 91 percent fixed-cost-recovery level for SoCal and the 59 percent level for NWC were established by private contractual arrangements between Transwestern and its customers.

The significance and enforceability of private contracts under the Natural Gas Act has been frequently confirmed by

this Court and is an established part of the jurisprudence of the Natural Gas Act. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 339 (1956) ("the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public"); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (dealing with the role and effect of contracts under the Federal Power Act and the proof required for their abrogation); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 154 (1960) ("the scheme of the [Natural Gas] Act was one which built the regulatory system on a foundation of private contracts"); *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) ("[t]he regulatory system created by the [Natural Gas] Act is premised on contractual agreements voluntarily devised by the regulated companies").[9] *See also United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958).

One of the requirements of Section 7 of the Act is that the pipeline be both *willing* and able to make the proposed sale or provide the proposed service. Once begun, a sale or service cannot be abandoned without Commission approval. 15 USC § 717f(b) (1982). In many cases, therefore, and specifically in Transwestern's case, the willingness to provide the service is dependent upon the level of cost recovery that

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[9] The need for long-term contracts was reiterated in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 659 (1964), where Justice Douglas, speaking for the Court, stated: "In this regulated industry, a natural gas company (unless it has excess capacity) must compete for, enter into, and then obtain Commission approval of sale contracts in advance of constructing the pipeline facilities. In the natural gas industry, pipelines are very expensive; and to be justified they need long-term contracts for sale of the gas that will travel them."

is assured. In this area, contracts have a particularly significant role.

On the other hand, if the Commission determines on the basis of substantial evidence that a contract or tariff arrangement is unjust and unreasonable, the Commission has plenary authority under Section 5 of the Act to modify it and to replace it with one that is just and reasonable. This Court has repeatedly reaffirmed that such action is not lightly to be undertaken and is justified only when required by the public interest rather than the private interests of the contracting parties. *FPC* v. *Sierra Pacific Power Co., supra,* at 355 (public interest rather than private interests are Commission's "sole concern"); *Permian Basin Area Rate Cases, supra* at 822 (the Act "contemplates abrogation of these agreements only in circumstances of unequivocal public necessity").[10] *Arkansas Louisiana Gas Co.* v. *Hall,* 453 U.S. 571, 582 (1981) (Commission lacks authority, "absent extraordinary circumstances," to abrogate existing contractual arrangements). *See also Associated Gas Distributors* v. *FERC,* 824 F.2d 981, 1016 (D.C. Cir. 1987) ("[u]nilateral abrogation of contracts is an extreme measure").[11]

Transwestern urged that the Commission had not met the standards of *Mobile-Sierra* in the abrogation of Transwestern's contracts. As there was *no evidence* addressing the effect of the fixed-cost minimum bills, there was no showing of a public interest justifying their abrogation. Transwest-

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[10] In Opinion 238, the Commission appears to assume that the public interest is the same as that of Transwestern's "competitors and customers." Opinion 238-A, App. C-26. Nothing in the record supports this conclusion.

[11] In *Wisconsin Gas Co.* v. *FERC,* 770 F.2d 1144, 1153 (D.C. Cir. 1985), *cert. denied sub nom. Transwestern Pipeline Co.* v. *FERC,* 106 S.Ct. 1968 (1986), the same court had rejected the argument that Order No. 380 impermissibly abrogated contracts in part on the rationale that cost recovery would continue to be provided through fixed cost minimum bills.

ern's contracts contained what are known as *Memphis* clauses,[12] permitting Transwestern to file rate and tariff changes, with the right reserved in its customers to oppose such changes. The Commission rejected Transwestern's position. It interpreted the *Mobile-Sierra* doctrine as applying only to contracts which did *not* contain *Memphis* clauses. Specifically, in Opinion 238, the Commission stated that, "for the *Mobile-Sierra* doctrine to apply, the agreement between the company and the customer must provide no changes will be made in the tariff." As Transwestern reserved the right to file tariff changes, the Commission held that "the *Mobile-Sierra* doctrine with its stringent burden of proof does not apply here." App. C-16.

The lower court recognized that Transwestern's minimum bills were fixed by contract. It affirmed, however, without addressing the *Mobile-Sierra* issue.

The Commission's holding conflicts with the decisions of this Court, including specifically *United Gas Pipe Line Co.* v. *Memphis, Light, Gas & Water Div.*, 358 U.S. 103 (1958). There, after quoting *Mobile* to the effect that the Act "evinces no purpose to abrogate private rate contracts" this Court approved a rate change filing stating the pipeline was doing no more than enforcing "rights expressly reserved to it by contract." *Id.* at 110, 112. The provision providing for the filing was recognized as one required by "business reality". Further, interpreting *Mobile,* this Court stated that a provision of this type was consistent with preserving the integrity of private contractual arrangements and at the same time providing for the "effectuation of contractually authorized" changes subject to appropriate Commission review. *Id.* at 114. In short, this Court's decision in *Memphis*

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[12] So named because of the type of provision before the Court in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 102 (1958).

is in direct conflict with the Commission's interpretation of *Mobile-Sierra* doctrine in Opinion 238 and the lower court's affirmance.

Virtually all contracts between pipelines and their customers contain *Memphis* clauses similar to those contained in Transwestern's contracts.[13] As a practical matter, the Commission's interpretation eliminates the contract protection which *Mobile* and the cases following it have repeatedly stated that Congress intended to assure. Whether contracts that contain provisions authorizing a pipeline to make tariff changes can lawfully be treated by the FERC as being outside of the *Mobile-Sierra* rule is a matter of substantial importance in the industry. The Commission and the court below have placed an unlawful and unwarranted limitation on the *Mobile-Sierra* doctrine. This Court should review and correct this error.

II.

The Commission Has Not Engaged in Reasoned Decision Making in Eliminating Transwestern's Fixed-Cost Minimum Bills. The Standards Which It Applied Are Arbitrary.

A. The Anti-Trust Concepts of "Restraint of Trade" and "Anticompetitiveness" are Not Appropriate Bases for the Elimination of Fixed-Cost Minimum Bills.

The fixed-cost-only minimum bill operates solely to recover a percentage of fixed costs included in the commodity rate which costs the regulated pipeline has reasonably and prudently incurred in providing the certificated service. The Commission's total elimination of Transwestern's minimum bills on the ground that they "restrain trade" or are "anticompetitive" represents a misuse and misapplication of

[13] The court in *Memphis* observed that this type of provision is "typical" in the industry. 358 U.S. at 115.

antitrust concepts developed under different statutes for different purposes. The Commission has given talismanic treatment to these terms. They do not fit so neatly into the Act. They do not form a sufficient basis under the Act on which to strike a contract or tariff provision dealing with cost recovery for a regulated pipeline. Nor do they form a sufficient basis from which to launch a new policy for the substitution of some other method of cost recovery. There is no rational basis either for the premise that an agreement that, in fact, induces additional purchases in the process of cost recovery, restrains trade nor for the conclusion that, if it does "restrain trade" it is *per se* unjust, unreasonable, and unlawful under Section 5 of the Act.

Transwestern submits that a minimum bill is not unjust and unreasonable under Section 5 of the Act simply because it may be said to induce the purchase of gas from the pipeline having the minimum bill, rather than from some alternative supplier. Nothing in the Natural Gas Act suggests that Congress intended that any cost-recovery mechanism, whether fixed by contract or established unilaterally pursuant to Section 4 of the Act, which might under the circumstances have the effect of inducing the pipeline's customer to purchase gas from the pipeline in preference to gas from other sources, should for that reason alone be deemed unjust, unreasonable, and unlawful.

Whether "restraint of trade" or "anticompetitiveness" are grounds for eliminating the minimum bill as a mechanism for the recovery of costs actually incurred or proscribing other cost-recovery mechanisms having similar effects, is a matter that should be determined by this Court. It directly affects fundamental concepts of cost recovery for all pipelines regulated under the Act.

B. The Commission's Conclusion that "Any Minimum Bill" for Transwestern Restrains Trade Is Arbitrary.

In Opinion 238, the Commission has held that "*any* minimum bill" for Transwestern's customers (meaning literally from 1 percent of fixed-cost recovery to 100 percent) constitutes an unreasonable restraint of trade and is thus unjust and unreasonable under Section 5 of the Natural Gas Act. App. C-26 (emphasis added). It has applied this conclusion in other cases. See cases cited in footnote 7, page 8. This is, on its face, arbitrary and cumulative support for this Court to review.[14]

C. The *Atlantic-Seaboard* Test Is Inapplicable to Transwestern's Contract-Based Minimum Bills.

Both the FERC and the court below tested the justness and reasonableness of Transwestern's minimum bill arrangements on the basis of the standards and justifications set forth in *Atlantic Seaboard.*[15] The decisions of this Court require that different standards be applied.

Transwestern's minimum bill was fixed by contract. The cost-recovery protection it provides formed the basis in sub-

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[14] In undertaking to provide support for the conclusion that Transwestern's minimum bills "restrain trade," the Commission equates the minimum bill to a requirements contract under conditions in which supply exceeds demand. App. C-26, D-23. The court below agreed. App. A-14. It is submitted that the tortured explanation given by the Commission in justification of its analogy has no logical or rational underpinning. Transwestern's minimum bill is not a requirements contract. It does not have the characteristics of or resemble in any respect a requirements contract. The analogy is so strained, remote and procrustean that it cannot be translated into a rational basis for the Commission's action.

[15] *Atlantic Seaboard Corp.*, 38 FPC 91, *aff'd*, 404 F.2d 1268 (D.C. Cir. 1968). These standards involve protection against the risk of not recovering fixed costs in the commodity bill, the protection of full requirements customers from bearing a disproportionate share of fixed costs and equitable recovery from customers of take-or-pay costs.

stantial part for Transwestern's agreement to undertake corresponding sales obligations to its customers. Its justness and reasonableness, therefore, should be tested against standards required for contractual abrogation, not on the basis of standards established for the unilateral incorporation of minimum bill provisions into tariff arrangements.

Further, the *Atlantic Seaboard* standards deal with whether a minimum bill is justified in the first instance, *i.e.*, whether it should be permitted to be incorporated unilaterally by a pipeline into its service arrangement. Opinion 238 and other cases following it deal with whether minimum bills of longstanding, which have been relied upon by the pipelines, should be excised from tariffs. The issues are different, and different standards should be applied. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut.*, 463 U.S. 29, 41-42 (1983). The Commission erred in applying the same standards to both.

D. The Commission's Refusal to Consider the Minimum Bill Arrangements Between SoCal and Its Affiliated Pipeline Suppliers Was Arbitrary.

The Commission ultimately rejected the view of the Presiding Administrative Law Judge and the Chief Administrative Law Judge that the competitive effects of minimum bills in the marketplace were common issues to all pipeline suppliers, and that the justness and reasonableness of Transwestern's minimum bill should not be decided in a "vacuum". *Pacific Gas Transmission Co.*, 28 FERC ¶ 61,217 (1984), *vacated sub nom. El Paso Natural Gas Co.*, 33 FERC ¶ 61,267 (1985). The Commission held that "the general rule is that a just and reasonable minimum bill for a pipeline must be based on the facts of that pipeline, not the minimum bills of its competitors." App. C-32. It has consistently applied that rationale. Transwestern submits this is illogical

and arbitrary.[16] The "facts of that pipeline" necessarily include facts relating to the competitive conditions it confronts, including in Transwestern's case the minimum bill arrangements which its customer, SoCal, has with SoCal's affiliated pipeline suppliers. This is particularly true when, as here, the Commission's analysis focuses on the competitive effects of the minimum bill. The exclusion of clearly relevant matters in the determination of what constitutes an "undue restraint of trade" is arbitrary and an abuse of discretion.

It is important for this Court to review and provide guidance regarding the facts that must be taken into account under Section 5 of the Act in determining the justness and reasonableness of existing minimum bill arrangements.

III.

The Commission's Failure to Justify the Departure from Its Longstanding Practice of Approving Minimum Bill Arrangements Conflicts With the Decisions of This Court.

Virtually since the inception of its administrative responsibilities under the Act, the Commission has approved and permitted minimum bills as legitimate mechanisms for cost recovery *cf., Trans-Continental Gas Pipe Line Co.,* 7 FPC 24, 38 (1948), *modified,* 8 FPC 1033 (1949).

This Court has clearly established that the Commission must set forth a "reasoned analysis" for any revocation or alteration of a longstanding policy.

> Revocation constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least

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[16] Contrast this view with the facts that Justice Brandeis said should be taken into consideration in determining restraint of trade. *See Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918).

> a presumption that those policies will be carried out best if the settled rule is adhered to." Atchison, T.&S.F. R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-808 (1973). Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Motor Vehicle Mfrs. Ass'n. v. *State Farm Mut.*, 463 U.S. 29, 41-42 (1983).

Admittedly, circumstances concerning gas supplies and costs have changed over the last forty years, but this alone does not answer the question why a minimum bill that recovers only *fixed-costs* would "restrain trade" any more now than it would have in the past. No explanation for the Commission's change in course is given, nor is the matter addressed by the Fifth Circuit.

In a matter as significant as the wholesale elimination of the minimum bill concept, the Commission's failure to set forth detailed, rational explanations for its change in direction contrary, to the requirements of the decisions of this Court, is a further basis for this Court's review. *Motor Vehicle Mfrs Ass'n* v. *State Farm Mut.; see also Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *Grace Petroleum Corp.* v. *FERC*, 815 F.2d 589 (10th Cir. 1987).

IV.

Important Questions Regarding the Substantial Evidence Requirement of Section 19 of the Natural Gas Act Warrant Review by This Court.

Section 19(b) of the Natural Gas Act provides that the findings of the Commission, "if supported by substantial evidence," are conclusive. App. F-4. *See also* Section 5 and 7 of the Administrative Procedure Act, 5 U.S.C. §§ 554, 556 (1982).

The Transwestern minimum bills that were the subject of the hearing were full-cost minimum bills, under which 90 percent of the costs represented gas costs. The evidence with respect to the competitive effect of Transwestern's minimum bills thus necessarily addressed the competitive effect of its *full-cost* minimum bills, not *fixed-cost-only* minimum bills. Recognizing this uncontrovertable fact, the Presiding Administrative Law Judge held that the proposals to eliminate Transwestern's minimum bill and to substitute the modified fixed-variable rate design were not supported by substantial evidence.

> Because Order No. 380 was issued after the record was closed in this proceeding, the degree to which the elimination of variable costs will affect the buying patterns of Transwestern's customers has *not been explored.* That such patterns will be affected however, is clear; variable costs account for approximately 90 percent of Transwestern's CDQ commodity charge. [citation omitted] It therefore is apparent that customer purchase prognostications based upon minimum bills which include variable costs presented on this record by all parties, including Transwestern, *are no longer meaningful and cannot be relied upon.* Common sense dictates that when 90 percent of the costs are deleted from a minimum bill charge, customers will have far less incentive to purchase at minimum bill levels. Such a disincentive would appear to be even greater where, as with PLGS, the customer has affiliated suppliers.
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> In summary, it is concluded that the claims of the proponents for each of the four proposals that their respective offering preserves the economic viability of Transwestern while keeping its minimum bills at the lowest possible level are lacking in substantial evidentiary support.
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> All other proposals [including Staff's zero minimum bill with modified fixed-variable rate design proposal]

> have insufficient evidentiary support to sustain a finding of just and reasonableness.

ALJ Initial Decision, App. E-38, E-42 (emphasis supplied).

The Commission concluded, however, that sufficient evidence existed to determine that Transwestern's fixed-cost-only minimum bill — a minimum bill that was not even in existence when the record was closed — unreasonably restrained trade and was, therefore, unlawful under Section 5 of the Natural Gas Act. The Commission's entire supporting analysis is contained in footnote 71 of Opinion 238. App. C-26. *See also* Opinion 238-A, App. D-26. The Commission states simply that "evidence in the record, our knowledge of the industry, and common sense" lead to the conclusion that "any minimum bill for Transwestern will have adverse consequences for its competitors and customers." App. C-26. The *only* evidentiary basis that the Commission identifies as support for its action is the fact that gas supplies to California and the midwest have exceeded and are expected to exceed demand. App. C-26.

The very purpose of minimum bill provisions or other similar cost recovery mechanisms has been to provide an assurance of some level of cost-recovery under these circumstances. At times when demand exceeded supply, there was no need for the minimum bill protection. App. A-11. Furthermore, every minimum bill involves a commitment by the purchaser to pay a portion of the fixed costs reasonably and prudently incurred in rendering the certificated service. The perceived defect in Transwestern's fixed-cost minimum bill applies in every pipeline's minimum bill arrangement.

The Fifth Circuit affirmed the Commission on the issue of substantial evidence. Responding to Transwestern's contention that the hearing record addressed only Transwestern's full-cost minimum bill, and that the conclusion reached by the Presiding Administrative Law Judge was clearly and

unquestionably correct, the court below provided no more than a "judicial echo" of the rationale stated by the Commission. *Cf., Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951). It stated merely that the Commission had based its finding of the anticompetitive impact of Transwestern's fixed-cost minimum bill on "a prediction of how those minimum bills would operate in the future in markets served by Transwestern," App. A-12, and that the Commission's prediction was based on "evidence in the record, its knowledge of the industry, and common sense." App. A-12.[17]

This Court set forth the standards of judicial review for determining "substantial evidence" in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951). The evidence relied upon here and the Commission's rationale do not in any way meet these standards.

The fact that gas supplies in an area exceed and are expected to continue to exceed demand simply does not constitute substantial evidence for a holding that Transwestern's fixed-cost minimum bills or *any* fixed-cost minimum bill, would unduly restrain trade or harm customers or competitors. Nor does the general observation, *which can be made in any FERC decision,* that the Commission is acting on the basis of its "knowledge of the industry" and is applying "common sense,"[18] constitute or supplant the necessity for substantial evidence.

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[17] *Cf., Arkansas Power & Light Co.* v. *FPC,* 517 F.2d 1223 (D.C. Cir. 1975), *cert. denied sub nom. Arkansas Louisiana Gas Co.* v. *FPC,* 424 U.S. 933 (1976), where the Court of Appeals for the District of Columbia reversed a Commission order based on "common sense" as being unsupported by substantial evidence.

[18] The court below also reasons that the question whether a full-cost minimum bill should be eliminated entirely "necessarily encompasses the question whether the fixed-cost portion should be eliminated also." App. A-22. In the context of determining whether a minimum bill unduly restrains trade, this is a *non sequitur.* It might reasonably be argued that if a

It is primarily the responsibility of the court of appeals to determine whether substantial evidence exists. This Court has stated:

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly applied.

Universal Camera Corp. v. *NLRB,* 340 U.S. 474, 491 (1951). Transwestern submits respectfully that this is such a case.

V.

The FERC's Failure to Consider the Take-or-Pay Consequences of Eliminating Transwestern's Minimum Bills is Arbitrary and Warrants Review by This Court.

As noted, Transwestern entered into a large number of contracts with producers in order to meet its contracted and certificated levels of deliveries to its customers. Its contracts, like those of other pipelines, contained take-or-pay provisions under which Transwestern agreed to take or pay for certain percentages of the volume of gas available for delivery. The take-or-pay provisions in Transwestern's producer contracts mirrored the take-or-pay minimum bill protection Transwestern had contracted for with its customers.

In Order No. 380, the Commission generically abrogated minimum bill provisions in pipelines' contract and tariff arrangements, including Transwestern's, to the extent they provided for the recovery of gas costs. In doing so, it expressed its intent to deal separately with the take-or-pay consequences of its action. The Court of Appeals for the

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fixed-cost only minimum bill restrains trade (a proposition Transwestern regards as incorrect and irrelevant), a full-cost minimum bill would do likewise. The same cannot be said of the reverse, however.

District of Columbia Circuit affirmed the Commission in *Wisconsin Gas Co.* v. *FERC,* 770 F.2d 1144, 1159-61 (D.C. Cir. 1985), *cert. denied sub nom. Transwestern Pipeline Co.* v. *FERC* 106 S.Ct. 1968 (1986). It agreed that it was within the Commission's discretion not to consider the take-or-pay consequences of its action in Order No. 380 and to address that matter separately. *Id.*.

Since *Wisconsin Gas,* the same court has concluded that the Commission's failure to deal with the producer take-or-pay issue in the context of subsequent decisions involving major policy changes, like Opinion 238, did not meet the requirements of "reasoned decision-making."

In *Associated Gas Distributors* v. *FERC,* 824 F.2d 981 (D.C. Cir. 1987), the court reversed and remanded Order No. 436 for further consideration of its take-or-pay consequences. That Order required pipelines to act as common carriers, providing "open access" for direct purchase and sales transactions between distributor companies, the pipelines' historical customers, and producers. The Order also provided for a phase-out of the distributor companies' contract demand agreements with the pipelines. The court held that, without consideration of the take-or-pay consequences of its action, the Order failed the test of "reasoned decision-making." *Id.* at 1021-1026, 1044.

Similarly, in *Consolidated Edison Co.* v. *FERC,* 823 F.2d 630 (D.C. Cir. 1987), the court reversed and remanded *Felmont Oil Corp.*, 33 FERC ¶ 61,333 (1985),[19] in which the Commission had liberalized its prior abandonment policies,

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[19] In the *Consolidated Edison* case, the court characterized the Commission's action as reflecting "a pervasive frame of mind of the Commission about a crucial problem in the natural gas industry, repeated in Order No. 436, *i.e.,* a refusal to face the fact that the burdens of take-or-pay contracts will not go away through declaratory actions that, while aiding much of the industry, actually appear to place *more* pressure on the pipelines." 823 F.2d at 841-42 (emphasis in original).

making it easier for producers to disconnect from pipelines with whom they had contracts and to contract with other pipelines or distributor customers. The failure to consider the take-or-pay consequences of this policy change was similarly held inadequate under the standard of reasoned decision-making. *Id.* 641-42. *See also* the court's analysis of its *Associated Gas Distributors* decision regarding the need for the Commission to integrate considerations of the take-or-pay consequences of its actions. *Id.* at 640-643, 644.

To the extent the Commission is correct, that the fixed-cost minimum bills induce the purchase of gas that might not otherwise be purchased, there is a plain and directly corresponding effect on the pipelines' purchases from producer/suppliers and thus on the level of take-or-pay exposure. The take-or-pay issue and the Commission's rationale for the elimination of Transwestern's minimum bills are thus inextricably interwoven.[20] The indulgence of the court below in permitting the Commission to eliminate Transwestern's minimum bills, as it has eliminated the minimum bills of other pipelines, without addressing the take-or-pay issue, is in conceptual conflict with the recent decisions of the District of Columbia Court of Appeals dealing with Order No. 436 and Opinion No. 245. The failure of the Commission to address the take-or-pay consequences of its action is a further basis for a grant of certiorari and a review by this Court of the decision of the court below.

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[20] Transwestern offered evidence that the absence of a minimum bill could expose it to take-or-pay claims in excess of $1 billion. The court below characterizes this threat as "hypothetical," App. A-20, stating that Transwestern had made no take-or-pay payments. The short answer is that Transwestern had no take-or-pay exposure because when the record was closed it still had a full-cost minimum bill. Since the elimination of its minimum bill, Transwestern has been subject to a large number of take-or-pay claims by producers.

CONCLUSION

This Court should issue its writ of certiorari to review the decision of the court below.

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